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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-8411

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Missouri Court of Appeals, St. Louis District entered in this action on August 5, 1975, which became final on denial of the defendant-appellant's application for transfer to the Missouri Supreme Court on November 10, 1975.

OPINIONS BELOW

The opinion of the Circuit Court of the City of St. Louis, Missouri is reprinted in Appendix E and the opinion of the Missouri Court of Appeals, St. Louis District is reprinted in Appendix H. Neither is reported as of this date.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC § 1257(3).

The St. Louis City Circuit Court entered judgment against the defendant on September 28, 1973 by default in a total amount of $96,000 plus costs. The defendant sought, after the expiration of time for filing an appeal, to vacate the judgment on the grounds, among others, that it was void because it was entered in contravention of the defendant's rights to due process of law under the Fourteenth Amendment to the United States Constitution. The defendant's contention was that it had no notice or opportunity to appear at a hearing held on June 28, 1973, to prove up the plaintiff's damages and that damages were entered in the default judgment on causes of action which were not pleaded and of which the plaintiff had no notice. On February 20, 1974, the Circuit Court of the City of St. Louis, Missouri, entered its judgment denying the motion to vacate and on August 5, 1975, the Missouri Court of Appeals, St. Louis District entered its opinion affirming said Judgment. On August 19, 1975, defendant filed its Motion for rehearing or transfer to the court en banc which was summarily denied on September 8, 1975. On October 11, 1975 defendant filed its application for transfer of said appeal to the Missouri Supreme Court and on November 10, 1975, said application was summarily denied. This petition for a writ of certiorari has been filed within 90 days of November 10, 1975, as required by Rule 22. *Department of Banking v. Pink*, 317 U.S. 264 (1942); *United States v. Healy*, 376 U.S. 75 (1964).

QUESTIONS PRESENTED

Does entry of a judgment by default on claims or causes of action not included in the Petition served upon the defendant, and of which the defendant had no notice, violate defendant's right to due process of law under the Fourteenth Amendment to the Constitution of the United States of America?

Is a judgment entered upon claims or causes of action not pleaded, and of which defendant had no notice or opportunity to be heard, void as entered in violation of the defendant corporation's right to due process of law under the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves important questions concerning the right of a litigant in a State court to due process of law under the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

Plaintiff filed an action on March 14, 1973 against International Telephone & Telegraph Corporation (hereinafter ITT) alleging a claim for relief under § 290.140, Mo.Rev.Stat., 1969 (the Missouri Service Letter Statute). Count I of the Petition sought actual damages of $21,000 and Count II sought punitive damages of $100,000 (see Appendix A).

Summons was served on the registered agent of the defendant in Missouri on March 16, 1973 and no answer or other responsive pleading was filed, and on June 12, 1973, an interlocutory decree of default was entered and an inquiry into damages was set for June 28, 1973. Defendant received no notice that the interlocutory decree had been entered or the setting of the hear-

ing on damages. The defendant was not represented at that hearing.

At the evidentiary hearing of June 28, 1973, the plaintiff testified that he had been employed by ITT for about three and one-half years pursuant to a written agreement and that he was terminated in violation of the provisions of that agreement. He then testified to out-of-pocket damages in excess of $21,000 which included relocation expenses for a job he obtained in Birmingham, Alabama, lost wages between that job and a job he subsequently obtained in Arkansas, that he lost the job in Alabama because of interference by ITT, relocation expenses from Alabama to Arkansas, and other various miscellaneous expenses in selling his home in St. Louis and relocating on those two occasions:

The Missouri Service Letter Statute (§ 290.140, Mo. Rev. Stat., 1969) provides:

> "Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

The Petition filed in the action did not charge any cause of action for wrongful breach of the contract of employment or for any interference with subsequent employment. Clearly, as a matter of law, those causes of action were not within the purview of the Petition. The Petition was never amended.

Subsequent to the damage hearing and at the request of the judge during the damage hearing, the plaintiff filed a Memorandum with the court, and failed to send any copy of that Memorandum to the defendant. That Memorandum (Appendix D, Exhibit A) sought entry of the judgment on claims not within the purview of the cause of action set forth in the Petition served on ITT.

On September 28, 1973, the defendant still remaining in default, the court entered a judgment in the amount of $96,000 plus costs (Appendix B).

The defendant filed its Motion to Set Aside Judgment and Petition for Review (Appendix C) and subsequently filed a First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review (Appendix D). A hearing was held on February 7, 1974 at which Robert Bucci, an attorney for ITT, testified that he was the attorney handling the matter and that he had not been advised that an interlocutory decree of default had been entered or that a hearing had been set on damages until he received the notification that the September 28, 1973 judgment had been entered—after its entry.

On February 20, 1974, Judge Buder entered an order overruling and denying the First Amended Motion to Set Aside Judgment, etc. (Appendix E). Defendant filed its Notice of Appeal to the Missouri Supreme Court, asserting that the appeal involved constitutional issues (Appendix F), but that court rejected the assertion that constitutional questions were involved and remanded the appeal to the Missouri Court of Appeals, St. Louis District (Appendix G). ITT filed its Brief and the section

of that Brief setting forth the "Points Relied On" is set out in Appendix M.

On August 5, 1975, the Missouri Court of Appeals, St. Louis District, rendered an opinion (Appendix H) affirming the February 20, 1974 order (Appendix E). In doing so, it failed to consider the points raised in the appellant's Brief under Sections I, II and III and let the circuit court's ruling stand that:

> "The other irregularity upon which defendant relies relates to evidence introduced at trial. Defendant contends that testimony on issues other than one for service letter was adduced at trial and considered by the Court. It is claimed that such evidence exceeds the range of plaintiff's petition and is broader in scope. It appears that such irregularities, if any there be, do not constitute the type or class contemplated by the authorities. Korn v. Ray, 434 S.W.2d 798." (Appendix E).

ITT then filed a Motion for Rehearing which is set forth in Appendix I pointing out, among other things, that the court had failed to consider the constitutional issues raised. That Motion was summarily denied (Appendix J). Within the time prescribed by the Missouri Supreme Court Rules, the defendant-appellant then filed an application for transfer of the appeal to the Missouri Supreme Court (Appendix K) pointing out again that the court had failed to consider the constitutional argument and this was summarily denied on November 10, 1975 (Appendix L). Defendant has proceeded within the time prescribed to file this petition for a writ of certiorari.

Under Article 5, § 3 of the Constitution of the State of Missouri, the Missouri Court of Appeals is the highest Court of the State of Missouri to which the appellant could have recourse unless an application for transfer were granted and said application was in fact denied. Accordingly, the decision of the Missouri Court of Appeals constitutes a decision of the highest court for purposes of 28 USC § 1257(3).

REASONS FOR GRANTING THE WRIT

This court should grant a writ of certiorari and review the decision of the Missouri Court of Appeals, St. Louis District, because that decision affirmed the circuit court's holding that the denial of due process present in this case did not constitute legal grounds for relief from the judgment and this case evidences a substantial deprivation of procedural due process of law required by Amendment 14 to the United States Constitution.

The default judgment entered on September 28, 1973 was entered in violation of the defendant's rights to due process of law under the Fourteenth Amendment to the Constitution of the United States of America in that it was entered on causes of action not within the purview of the pleadings and therefore the defendant had neither notice nor opportunity to be heard on those claims. The Missouri Supreme Court's initial refusal to take jurisdiction of the appeal and its later refusal to grant the defendant's application to transfer the appeal after the adverse decision of the Missouri Court of Appeals, St. Louis District, was a refusal to consider the constitutional issues raised. Likewise, the Missouri Court of Appeals refused to consider the constitutional issues raised in the appellant's Brief (see Appendix M and H) and therefore the decision of the St. Louis Circuit Court that the irregularities asserted, including the failure to give notice of the claims upon which judgment was ultimately granted, did not constitute any grounds for relief from the judgment (Appendix E), stands affirmed. Thus, the defendant's rights under the United States Constitution have been abridged and this is the substantial issue upon which this court is asked to grant its writ of certiorari and hear this matter.

Clearly, the failure to accord a defendant procedural due process of law in entering the judgment is grounds for the grant-

ing of a petition for a writ of certiorari to this court. See *Buchalter v. New York*, 319 U.S. 427 (1943).

The Missouri Service Letter Statute (§ 290.140, Missouri Revised Statutes) provides that wherever any employee of any corporation doing business in the State of Missouri is discharged or quits then it is the duty of the superintendent or manager of the corporation upon the written request of the employee to provide him with a letter setting forth certain information. The failure to provide such a letter, upon a proper request, gives rise to an award of actual damages which must be founded on a refusal of employment based on failure to have the service letter. *Johnson v. American Mutual Liability Insurance Co.*, 335 F. Supp. 390 (W.D.Mo., 1971) and absent such proof only nominal damages may be recovered. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845(2) (St.L.Ct.App., 1952). ITT is an international corporation incorporated in the State of Delaware and the plaintiff in this case was employed by a division of ITT located in Connecticut. He had, however, been employed by ITT for approximately three and one-half years and was working in the St. Louis area. He was discharged by ITT on or about January 2, 1973, and sent a written request for a service letter to his supervisor in Southfield, Michigan, which was delivered about January 10, 1973. He requested a letter "setting forth the nature of my employment, the date of my employment, and the cause of my discharge." There was no reference to the Missouri Service Letter Statute in the request.

The Petition which was filed in the action and was served on March 14, 1973, specifically alleges a violation of the service letter statute and specifically states that the damages result from the plaintiff's inability to secure similar employment as a result of not having such a letter and from mental distress and mental suffering occasioned by the failure to receive such a letter. (See Appendix A).

The principle is well established that a judgment based on issues not raised by the pleadings is *coram non judice* and *void*. This court early recognized that principle in *Reynolds v. Stockton*, 140 U.S. 254 (1891). This court stated there that:

> "But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings."
>
> (loc. cit. 270).

In the instant case, the plaintiff failed to prove any loss of employment opportunity based upon a failure to provide a service letter. Instead, his evidence showed that the plaintiff had been discharged in violation of the written employment contract between the plaintiff and defendant and had then incurred substantial relocation expenses in moving to his new job in Alabama. The law in Missouri is abundantly clear that wrongful discharge is not part of a claim for breach of the service letter statute. *Woods v. Kansas City Club*, 386 S.W.2d (Mo.Supp., 1964), and *Roberts v. Emerson Electric Mfg. Co.*, 338 S.W.2d 62 (Mo.Supp. 1960). That cause of action was not pleaded in the plaintiff's Petition (Appendix A) and as a matter of law is not within the purview of the pleading, and defendant had no notice and opportunity to respond to that belatedly asserted cause of action because it was not advised that the interlocutory decree of default had been entered and that a damage hearing had been set and was subsequently held on June 28, 1974.

A substantial portion of the other actual damages awarded was based upon an alleged interference with the plaintiff's Alabama employment by the defendant allegedly sending a document to that employer stating that employees of ITT should

not be hired by its distributors. It should be noted that there was no allegation of wrongful interference with subsequent employment, conspiracy or black-listing in the Petition filed and they are not within the purview of the cause of action pleaded. Accordingly, defendant had no notice or opportunity to be heard on this belatedly asserted cause of action and a judgment premised upon such a cause of action is void. See *Reynolds v. Stockton, supra.*

Both the unpleaded claim of wrongful discharge and the claim of wrongful interference with subsequent employment were specifically stressed in the Memorandum filed by the plaintiff (Appendix D, Exhibit A). This Memorandum was filed without any notice to the defendant and defendant never received a copy of said Memorandum prior to the September 28, 1973 entry of judgment against it.

Clearly, defendant was in default on the petition filed and the Court had the power and authority to enter a judgment on the cause of action pleaded in the absence of the defendant's appearing to defend and such an action would not have abridged or violated any title, right, privilege or immunity which the defendant has under the Constitution of the United States. However, the entry of a judgment on causes of action which are not pleaded and on which the defendant had no notice does abridge the rights of the defendant under the Fourteenth Amendment to the Constitution, specifically the right to due process of law which includes the prerequisites of notice and an opportunity to be heard before entry of any judgment. *Boddie v. State of Connecticut*, 401 U.S. 371 (1971). The failure to give notice of the evidentiary hearing and the assertion at that evidentiary hearing, and in the Memorandum filed in the court by the plaintiff, of causes of action not pleaded without giving the defendant any notice of those causes of action or any opportunity to either appear at the evidentiary hearing or to file a Memorandum in opposition to the Memorandum filed

constitutes a deprivation of due process of law and the action of the Circuit Court of the City of St. Louis in concluding that these failures to observe the fundamental prerequisites of due process of law do not constitute a ground for setting aside the judgment is a complete emasculation of the rights established by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted

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Of Counsel:

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APPENDIX

APPENDIX A

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton,
Plaintiff,
vs.

International Telephone and Telegraph Corporation,
Serve Registered Agent:
C T Corporation System
314 North Broadway
St. Louis, Missouri
Defendant.

No. 36962-F.
Div. 1.

PETITION

Count I

Comes now plaintiff and pursuant to Section 290.140 R.S. Mo., for his cause of action, states:

1. That defendant is now and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; that said corporation has been and at all times herein mentioned is qualified to do business in the State of Missouri with a registered office at 314 North Broadway, St. Louis, Missouri.

2. That on or about the 3rd day of January, 1973 and for approximately 2½ years prior thereto, plaintiff was in the em-

ploy of defendant as a "Supervisor Installation, Maintenance and Tests"; that on said date he was fired effective immediately.

3. That on or about the 8th day of January, 1973 plaintiff duly requested defendant to issue him a service letter, all in accordance with Section 290.140 R.S.Mo. and the defendant has refused to issue such letter to plaintiff in direct violation of said statute, and in direction violation of plaintiff's civil rights.

4. Plaintiff further states that because of said refusal to issue to him a service letter as per the aforesaid statute, he has been and in the future will be unable to secure similar type employment, all to his damage in the approximate amount of $20,000.00 and, further, said plaintiff was caused to endure and will in the future endure and suffer from mental distress and mental suffering, all to plaintiff's damage in the sum of $1,000.00.

Wherefore, plaintiff prays judgment against defendant under Count I of his petition for the sum of Twenty-One Thousand Dollars ($21,000.00) and for his costs herein expended.

Count II

1. Plaintiff adopts and incorporates by reference Paragraphs 1, 2, 3 and 4 of Count I of his petition.

2. Plaintiff states that the aforesaid refusal of said defendant was intentional and without reasonable cause or excuse and was therefore willful, wanton and malicious.

3. Plaintiff further states that said refusal was due to actual malice on the part of defendant in this that said refusal was intentional and due to spite and ill will on the part of defendant, its agents and servants.

4. That by reason of the aforesaid malice on the part of said defendant, its agents and servants, said plaintiff ought to have and recover of said defendant a further sum of $100,000.00 as punitive damages in the premises.

Wherefore, plaintiff prays judgment against defendant under Count II of his petition for the sum of One Hundred Thousand Dollars ($100,000.00) and for his costs herein expended.

AUBUCHON & LAVIN
Attorneys for Plaintiff
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St. Louis, Missouri 63101
MA 1-1575

APPENDIX B

In the Circuit Court, City of St. Louis
Lester L. Fulton

vs.

International Telephone and Telegraph Corporation

No. 36962F Room 1 September 28, 1973

MEMORANDUM FOR CLERK

Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default.

Upon testimony and evidence previously heard, adduced and taken as submitted, judgment and finding in favor of Plaintiff on Count I in the sum of $21,000.00 and costs. Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.00 as punitive damages.

MICHAEL J. SCOTT, Judge

APPENDIX C

State of Missouri }
City of St. Louis } ss

In the Circuit Court of the City of St. Louis, Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.

No. 36962
Division 1

MOTION TO SET ASIDE JUDGMENT AND PETITION FOR REVIEW

Comes now Defendant International Telephone and Telegraph Corporation and for its motion to set aside the judgment entered in this cause against it and for its Petition for Review of said judgment states:

1. The petition in this case was filed on or about March 14, 1973. Thereafter on June 13, 1973, an interlocutory judgment in default (a default and inquiry) was entered, and on June 28, 1973, a hearing on said default and inquiry was held before the Honorable Michael J. Scott. On August 2, 1973, at the direction of the Court, Plaintiff filed a Memorandum setting forth his asserted basis for securing the judgment for substantial, actual and punitive damages, said Memorandum is marked Exhibit A and appended hereto. That judgment was subsequently entered against defendant for $21,000 actual and $75,000 punitive damages and costs on September 28, 1973, making a total judgment against defendant for $96,000 and costs.

2. Petitioner for its cause for vacating said judgment states that, as more particularly set forth below, said damages were assessed on causes of action not pleaded in the Plaintiff's Petition, that no amended pleading was served upon it setting forth the claims or causes of action which are the basis of the judgment, that the judgment entered violates due process of law requirements of the Constitution of the United States of America and the Constitution of the State of Missouri, that acts of the plaintiff and his failure to disclose pendency of the default proceeding deprived defendant of due process of law, that there has been a failure to comply with Missouri Statutes and the Rules of Civil Procedure and that certain material facts in the Plaintiff's Petition were untrue and defendant has now and then had a good defense thereto.

3. The judgment entered on September 28, 1973, is based on claims or causes of action not within the purview of the Plaintiff's Petition. Said claims or causes of action on which plaintiff requested and secured entry of this judgment, are set forth in Exhibit 1, all of which are outside the purview of his plea for damages for violation of the Service Letter Statute (§290.140, Revised Statutes, Missouri, 1971) include:

> "The Court should further consider in this regard Defendant's announcement of March 13, 1973 to its distributors that no ex-employees of defendant should be employed by the said distributors which, of course, was a pistol-point arrangement that penalties would immediately follow if such an edict was carried out by its distribtuors and eventually lead to the severance of plaintiff from his then present employment with Telephone Service Company of America in Birmingham, Alabama." (Paragraph 10 of Plaintiff's Memorandum)
>
> * * * * * * * *
>
> "[P]laintiff did sever his relations with Pacific Telephone Company where he had been employed for fourteen years

and eight months consecutively before resigning from that job to accept employment with defendant. Severance of that employment also meant forfeiture of certain benefits which would have been flowing to him if his tenure with that company had not ceased, but as a result of his employment and being lured to ITT he has now forfeited beyond recall vested rights consisting of retirement payments to be attained on his 62nd birthday; insurance benefits of life and health, not only for himself but his wife and family; and the normal increase in his salary from Pacific Telephone Company." (page 4 of Plaintiff's Memorandum)

Actual damages of $21,000 were assessed on the foregoing claims with no instance cited in Exhibit 1 that he had been denied employment as a result of failure to provide a service letter, which is the only grounds for assertion of actual damages. The actual and punitive damages were therefore being assessed on grounds not properly within the purview of the petition served upon the defendant. The foregoing quoted portions of Exhibit A clearly show that plaintiff was asserting causes of action for blacklisting, interference with contractual relations, conspiracy, for fraudulently inducing an employee to enter employment with ITT etc., none of which were pleaded.

The award of the damages therefore on causes of action not pleaded is coram non judice, violates the due process requirements of the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Constitution of the State of Missouri, in that defendant had no notice of the claims asserted in Exhibit A and is contrary to the requirements of Missouri law, Statutes, and Court Rules requiring service of amended pleadings on defendants in default.

4. Defendant was deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the

United States of America and Article I, section 10 of the Constitution of the State of Missouri as to both the initial entry of default and the assessment of damages in that:

(a) Defendant reasonably believed that the action threatened in the certified letter dated June 5, 1973 (marked Exhibit 4 at the June 28, 1973 hearing), had been withdrawn on the basis of subsequent correspondence, marked Exhibits B and C (appended hereto and incorporated herein by reference). In Exhibit C, responding to Exhibit B, attorneys for plaintiff failed to advise the defendant of the actual entry of the interlocutory decree of June 13, the proceedings of June 28, to assess the substantial damages, and/or the impending submission of the Memorandum (Exhibit A) which he ultimately submitted on August 2, 1973, to this Court, thus failing to give an opportunity to Defendant to respond thereto. In fact no copy of the Memorandum was ever sent to defendant.

(b) Exhibit C induced the defendant to reasonably believe that no action would be taken without some further warning or advice and until some further negotiations had occurred between the parties and effectively kept it from inquiring into the status of the case. Said response amounted to a tacit assurance that no proceedings to enter judgment were pending.

(c) In its Memorandum on August 2, 1973 (Exhibit A), plaintiff's attorney failed to advise the Court of defendant's inquiry (Exhibit B) or his response (Exhibit C) but instead stressed that there had been no response as of the date of the hearing to the June 5, 1973 letter (paragraphs 5 and 6 of Plaintiff's Memorandum), which amounted to a concealment from the Court of the defendant's inquiry and an implicit representation that defendant had made no response to the June 5 letter. As an officer of the Court, plaintiff's attorney had the duty to advise the Court that

the defendant had inquired into the status of the case after the hearing and before the assessment of damages. It is submitted that the Court would not have entered the judgment of September 28, 1973, if it had been aware of the correspondence set forth in Exhibits B and C.

(d) Defendant first received notice that the judgment was to be entered on October 1, 1973, a copy of which is marked Exhibit D (appended hereto and incorporated herein by reference). Although the Court apparently intended to give defendant a warning before entry of the final judgment by sending a copy of proposed judgment, that notice was not mailed until the afternoon of September 26. The envelope in which said notice was mailed to defendant is marked Exhibit E (appended hereto and incorporated herein by reference). The entry of judgment, marked Exhibit E (appended hereto and incorporated herein by reference) was received on October 2, 1973.

(e) The Circuit Court Clerk did not comply with the requirements of Rule 74.78, Missouri Rules of Civil Procedure.

5. Defendant-petitioner further states that the Plaintiff's Petition is untrue in various material matters in that:

(a) the absence of a service letter did not preclude plaintiff from securing "similar type employment" to that he had with defendant, prior to the filing of his Petition, in fact on defendant's recommendation the plaintiff secured similar employment within three weeks;

(b) the absence of a service letter did not preclude plaintiff from obtaining "similar type employment," to that he had with defendant, after filing his Petition, in fact he was employed in the same type business for Stanley Communications Company, Inc.;

(c) plaintiff did not sustain damages in the amount of $20,000 as a result of the alleged inability to secure said "similar type employment," and

(d) the absence of a service letter was not due to actual malice, spite, ill will, and was not willful, wanton and malicious. In fact, as set forth in (a) above, defendant assisted him in obtaining employment.

6. Further, defendant has a defense to the cause of action pleaded in Plaintiff's Petition for the reason that the Missouri Service Letter Statute is inapplicable because:

(a) the contract of employment (Plaintiff's Exhibit 6) by which plaintiff entered defendant's employ was not made in Missouri;

(b) plaintiff was a resident of California when initially employed by defendant;

(c) Exhibit 6 paragraph 13 indicates the parties at the time of executing Exhibit 6 intended New York law to govern their relationship;

(d) defendant is a Delaware corporation;

(e) the purported request for a service letter (Plaintiff's Exhibit 8) was delivered in Michigan.

Wherefore, Plaintiff prays the Court:

(1) Enter an Order staying execution of the judgment entered on September 28, 1973, pending the final decision of this Motion and Petition;

(2) that the Court declare its said judgment null and void and of no force and effect;

(3) that the Court grant Plaintiff's Motion and Petition for Review and set aside the judgment entered in this cause against Defendant.

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State of Missouri }
City of St. Louis } ss.

James W. Herron being first duly sworn does depose and state that the facts as stated in the above Motion to Set Aside Judgment and Petition for Review are true to the best of his knowledge, information and belief.

JAMES W. HERRON

Subscribed and sworn to before me this Fourteenth day of November, 1973.

DOLORES V. EXLER
Notary Public

My Commission expires: April 10, 1976.

State of Missouri }
City of St. Louis } ss.

Robert A. Bucci being first duly sworn does depose and state that the facts as stated in the above Motion to Set Aside Judgment and Petition for Review are true to the best of his knowledge, information and belief.

ROBERT A. BUCCI

Subscribed and sworn to before me this Fourteenth day of November, 1973.

DOLORES V. EXLER
Notary Public

My commission expires: April 10, 1976.

APPENDIX D

FIRST AMENDED MOTION TO SET ASIDE JUDGMENT AND TO QUASH EXECUTION, AND PETITION FOR REVIEW

"Comes now Defendant International Telephone and Telegraph Corporation and for its First Amended Motion to Set Aside the Judgment entered in this cause against it to Quash Execution thereon and for its First Amended Petition for Review of said judgment states:

"1. The petition in this case was filed on or about March 14, 1973. Thereafter on June 13, 1973, an interlocutory judgment in default (a default and inquiry) was entered, and on June 28, a hearing on said default and inquiry was held before the Honorable Michael J. Scott. At the direction of the Court, plaintiff, filed a memorandum setting forth his asserted factual basis for securing the judgment for substantial, actual and punitive damages, said Memorandum is marked Exhibit A and appended hereto. That judgment was subsequently entered against defendant for $21,000 actual and $75,000 punitive damages and costs on September 28, 1973, making a total judgment against defendant for $96,000 and costs.

"2. Petitioner for its grounds for vacating and setting aside said judgment, and permanently quashing execution thereon states that, as more particularly set forth below, said damages were assessed on causes of action not pleaded in the Plaintiff's Petition, that no amended pleading was served upon it setting forth the claims or causes of action which are the basis of the judgment, that the judgment entered violates due process of law requirements of the constitution of the United States of America and the Constitution of the State of Missouri, that acts of the plaintiff and his failure to disclose pendency of the default

proceeding deprived defendant of due process of law, that other damages than those pleaded in plaintiff's petition were assessed, that plaintiff secured said judgment on the basis of false and misleading testimony, that plaintiff failed to disclose certain crucial facts to the Court, which would, if known to the Court, have caused the Court to refuse to enter the judgment; that there has been a failure to comply with Missouri Statutes and the Rules of Civil Procedure; that the Court lacked jurisdiction to enter the judgment that the evidence introduced by plaintiff at the July 28 hearing established that he had, as a matter of law, no claim for relief under the Missouri Service Letter Statute and that certain material facts in the Plaintiff's Petition were untrue and defendant has now and then had a good defense thereto.

"3. As a matter of law, plaintiff failed to establish that he lost any prospective employment, or the amount he would have made in any prospective employment, so there is no basis for awarding the substantial actual compensatory damages of $21,000.

"4. The judgment entered on September 28, 1973, is based on claims or causes of action not within the purview of the Plaintiff's Petition, and the actual and punitive damages assessed are therefore damages other than those pleaded. Said damages and the claims or causes of action on which plaintiff sought, requested and secured entry of this judgment, which are outside the purview of his plea for damages for violation of the Service Letter Statute (§ 290.140, Revised Statutes, Missouri, 1971) include:

> "(a) Plaintiff introduced the contract of employment marked Plaintiff's Exhibit 6 at the evidentiary hearing of June 28, 1973, and testified that his termination of employment with defendant violated that contract. No claim or cause of action for wrongful discharge or breach of contract had been pleaded and wrongful discharge or

breach of a contract had been pleaded and wrongful discharge or breach of a contract of employment are not within the purview of the Plaintiff's pleaded claim.

"(b) Although he introduced no evidence to show he lost a prospective employment in the St. Louis area as a result of failing to have a service letter, he sought and obtained entry of actual damages for:

"(1) Travel between Birmingham, Alabama and St. Louis, $702 (Transcript 44);

"(2) Air fare on weekends from Little Rock to St. Louis, $952.00 (Transcript 43);

"(3) Twenty-three weeks living expenses away from St. Louis at $26.00 a day, five days per week, $2,990.00 (Transcript 44);

"(4) Four trips to Little Rock by wife for house hunting purposes, $272 with living expenses for nine days at $14.00 a day, $126.00 (Transcript 44);

"(5) Telephone calls for income tax and family problems, $493.00 (Transcript 45-6);

"(6) Moving household goods, $1,592.00 (Transcript 46);

"(7) Travel expenses to move his family to Little Rock, $163.00 (Transcript 46);

"(8) Loss on the sale of his home in St. Louis (Transcript 44) including penalties and real estate commissions (Transcript 45) and closing costs on a home in Little Rock (Transcript 46) which along with a claimed $2,000 loss of income (Transcript 43) evidently made up the remainder of his claimed total actual damages of $27,065.00 (Transcript 46-7).

(c) Although the request for a service letter was not mailed until January 8, 1973 (Transcript 39-40) and defendant received it on the 10th (Transcript 40) and had

a reasonable time to respond, the plaintiff sought and obtained entry of damages of $400 a week for all three weeks he claims he was unemployed in January, 1973.

(d) Although there was no evidence to sustain a finding that his claimed two weeks unemployment between his employment in Birmingham, Alabama, and Little Rock, Arkansas, was in any way connected to failure * * * plaintiff sought and secured entry of $400 a week damages for a total $800 damages for this period as part of the $21,000 actual damages awarded.

(e) Plaintiff sought and obtained entry of judgment for substantial actual and punitive damages at the June 28 evidentiary hearing, on grounds of the mailing of the document marked Plaintiff's Exhibit 7 which he testified caused him to leave his employment in Birmingham, Ala. (Transcript 34-9). Said alleged interference with his subsequent employment is not properly a part of the claim pleaded in his petition and any alleged damages caused by said document are not within the purview of the claim for breach of the Service Letter Statute.

(f) In response to the Court's directive at the June 28 hearing to Plaintiff's counsel to file a Memorandum "paying particular attention to . . . a summary of the factual situation that's the basis of the request for recovery" (Transcript page 48), the plaintiff urged entry of substantial actual and punitive damages of the following matters not properly within the purview of his plea for damages for violation of the Service Letter Statute.

> "(1) "The Court should further consider in this regard Defendant's announcement of March 31, 1973 to its distributors that no ex-employees of defendant should be employed by the said distributors which, of course, was a pistol-point arrangement that penalties

would immediately follow if such an edict was carried out by its distributors and eventually lead to the severance of plaintiff from his then present employment with Telephone Service Company of America in Birmingham, Alabama."

(Paragraph 10 of Plaintiff's Memorandum)

(2) (P)laintiff did sever his relation with Pacific Telephone Company where he had been employed for fourteen years and eight months consecutively before resigning from that job to accept employment with defendant. Severance of that employment also meant forfeiture of certain benefits which would have been flowing to him if his tenure with that company had not ceased, but as a result of his employment and being lured to ITT he has now forfeited beyond recall vested rights consisting of retirement payments to be attained on his 62nd birthday; insurance benefits of life and health, not only for himself but his wife and and family; and the normal increase in his salary from Pacific Telephone Company." (page 4 of Plaintiff's Memorandum)

"On the basis of the foregoing, actual damages of $21,000 were assessed with no instance cited in Exhibit A or no proof in the transcript of the hearing of June 28 that Plaintiff had been denied employment as a result of failure to provide a service letter, on the date said employment would have begun or the amount plaintiff would have been paid all of which must necessarily be shown to recover substantial actual compensatory damages, or the location of any lost employment or the amount he would have received in any such employment. The actual and punitive damages were therefore being assessed on grounds not properly within the purview of the petition served upon the defendant. The foregoing quoted portions of Exhibit A and the

transcript clearly show that plaintiff was asserting and took judgment on claims for breach of contract, wrongful discharge, blacklisting, interference with contractual relations, conspiracy, for fraudulentiy inducing an employee to enter employment with ITT etc., none of which were pleaded. This Court therefore had no power or jurisdiction to enter a judgment on these unpleaded claims.

"This court lacked jurisdiction to award damages on causes of action not pleaded and the award of said damages is coram non judice, and is void, the judgment violates the due process requirements of the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Constitution of the State of Missouri, in that defendant had no notice of the claim not asserted in the pleadings and is contrary to the requirements of Missouri law, Statutes, and Court Rules requiring service of amended pleadings on Defendants in default.

"5. Defendant was deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 10 of the Constitution of the State of Missouri as to both the initial entry of default and the assessment of damages in that:

> "(a) Defendant reasonably believed that the action threatened in the certified letter dated June 5, 1973 (marked Exhibit 4 at the June 28, 1973 hearing) had been withdrawn on the basis of subsequent correspondence, marked Exhibits B and C (appended hereto and incorporated herein by reference). In Exhibit C, responding to Exhibit B, attorneys for plaintiff failed to advise the defendant of the actual entry of the interlocutory decree of June 13, the proceedings of June 28, to assess the substantial damages, and/or the submission or impending submission of the Memorandum (Exhibit A) submitted by plaintiff

to this Court, thus failing to give an opportunity to Defendant to respond thereto. In fact no copy of the Memorandum was ever sent to defendant.

"(b) Exhibit C induced the defendant to reasonably believe that no action would be taken without some further warning or advice and until some further negotiations had occurred between the parties and effectively kept it from inquiring into the status of the case. Said response amounted to a tacit assurance that no proceedings to enter judgment were pending.

"(c) As an officer of the Court, plaintiff's attorney had the duty to advise the Court that the defendant had inquired into the status of the case after the hearing and before the assessment of damages. It is submitted that the Court would not have entered the judgment of September 28, 1973, if it had been aware of the correspondence set forth in Exhibits B and C.

"(d) Defendant first received notice that the judgment was to be entered on October 1, 1973, a copy of which is marked Exhibit D (appended hereto and incorporated herein by reference). Although the Court apparently intended to give defendant a warning before entry of the final judgment by sending a copy of proposed judgment, that notice was not mailed until the afternoon of September 26. The envelope in which said notice was mailed to defendant is marked Exhibit E (appended hereto and incorporated herein by reference). The entry of judgment, marked Exhibit E (appended hereto and incorporated herein by reference) was received on October 2, 1973.

"(e) The Circuit Court Clerk did not comply with the requirements of Rule 74.78, Missouri Rule of Civil Procedure.

"6. Plaintiff perpetrated a fraud upon the Court and thereby induced it to enter the judgment of September 28, 1973, in that he (1) testified falsely at the evidentiary hearing of June 28, 1973, and (2) failed to advise the Court of crucial facts which, if they had been brought to the attention of the Court, would have caused this Court to decline to enter the judgment it entered herein, which testimony and facts included:

> "(a) Plaintiff failed to tell the Court that he had been in contact in January, 1973, with an employee of defendant named Maurice Lynch who was instrumental in obtaining, and recommended him for, employment by Telephone Service Company in Birmingham, Alabama. Plaintiff was in that employment from on or about January 22, 1973 to on or about March 25, 1973.

"Therefore, plaintiff did not tell the truth when he testified that the only persons from ITT with whom he had been in contact since his meeting with Walter Pepple on January 4, were Floyd C. Miller (Transcript 28-9) and Monty Russell (Transcript 30-32), as his contact with Maurice Lynch, which lead to his employment occurred after that date.

"(b) Plaintiff's testimony was not true when he represented to the Court that Plaintiff's Exhibit No. 6, an employment contract, was in force and effect at the time of termination of his employment with defendant. He failed to advise the court that that contract had been terminated in writing as provided by Exhibit No. 6 on or about July 5, 1973. On pages 18 through 22, of the transcript of the evidentiary hearing of June 28, 1973, the plaintiff discussed the contract and stressed that he was not terminated in conformance with its provisions.

"(c) certain of Plaintiff's testimony concerning expenses he had incurred was not true in that he testified his living expenses for the 26 week period from the date of his termination with ITT until the hearing were $26.00 a day, five days a week and that:

"Q. You've not been compensated for this?

"A. No, sir." (Transcript 44).

In fact that testimony was false as plaintiff received compensation of $23.00 a day, five days a week for living expenses in his job with Telephone Service Company for some or all of the period of his employment, which lasted from on or about January 22, 1973 to on or about March 25, 1973.

"(d) Plaintiff's testimony was untrue when he testified that until the date he received Plaintiff's Exhibit 7 he was planning to move his family to Birmingham, Alabama (Transcript 37), as on the basis of a document authored by plaintiff, it is clear that plaintiff had already decided to take a position with Stanley Communications Company in Little Rock, Arkansas.

"(e) Plaintiff's testimony was untrue when he testified that Telephone Service Company reneged on its alleged agreement to pay his moving expenses for his family from St. Louis to Birmingham, Alabama, and that it reneged because of its receipt of Exhibit 7 (Transcript 37-39). In fact, Telephone Service Company did not renege on paying moving expenses, and Exhibit 7 played no part in any decision it made concerning plaintiff.

"(f) Plaintiff's testimony was untrue and misleading when he stated that Stanley Communications Company, the company by which he was employed at the time of the June 28, 1973 hearing, was not in the 'telephone business.' (Transcript 35, 43) In fact he was hired by

Stanley Communications to obtain telephone interconnect business, the very field that he had been working in for ITT (Transcript 16-7) and for Telephone Service Company.

"(g) Plaintiff's testimony was false when he stated that Stanley Communications Company, the company by which he was employed at the time of the June 28, 1973 hearing, had requested a letter concerning his services with ITT. (Transcript 42). In fact, no such letter had been requested.

"(h) Plaintiff's testimony that there was a two week gap between his termination with the Telephone Service Company of Birmingham and his beginning employment with Stanley Communications in Little Rock (Transcript 34-5) was false and misleading. There was a one week gap and plaintiff failed to advise the Court that he had the job in Little Rock at the time that he voluntarily terminated from the Telephone Service Company job in Birmingham and that it was his decision to have any gap that occurred between the jobs.

"7. Defendant-petitioner further states that the Plaintiff's Petition is untrue in various material matters in that:

"(a) the absence of a service letter did not preclude plaintiff from securing 'similar type employment' to that he had with defendant, prior to the filing of his petition, in fact on defendant's recommendation the plaintiff secured similar employment at a higher pay than with defendant, within three weeks;

"(b) the absence of a service letter did not preclude plaintiff from obtaining 'similar type employment,' to that he had with defendant, after filing his Petition, in fact he was employed in the same type business for Stanley Communications Company, Inc., at a higher pay rate than when he was with defendant;

"(c) plaintiff did not sustain damages in the amount of $21,000 as a result of the alleged inability to secure said 'similar type employment,' and

"(d) the absence of a service letter was not due to actual malice, spite, ill will, and was not wilful, wanton and malicious. In fact, as set forth in (a) above, defendant assisted plaintiff in obtaining similar employment.

"8. Further, testimony of the plaintiff and exhibits introduced by him at the June 28 hearing established that plaintiff has, as a matter of law, no cause of action for violation of the Service Letter Statute and that defendant therefore, has a defense to the cause of action pleaded in Plaintiff's Petition for the reason that:

"(a) the contract of employment (Plaintiff's Exhibit 6) by which plaintiff entered defendant's employ was not made in Missouri;

(b) plaintiff was resident of California when initially employed by defendant (Transcript 15-6);

(c) Exhibit 6 paragraph 13 indicates the parties at the time of executing Exhibit 6 intended New York law to govern their relationship;

(d) defendant is a Delaware corporation;

(e) the purported request for a service letter (plaintiff's Exhibit 8) was delivered in Michigan.

Wherefore, Plaintiff prays the Court:

(1) declare its said judgment null and void and of no force and effect;

(2) grant this amended Motion and Petition and set aside the judgment entered in this cause against Defendant;

(3) grant the defendant ten days thereafter to file an answer or other responsive pleading to Plaintiff's Petition;

(4) permanently quash execution on said judgment;

(5) grant such other and further relief as to the Court may seem just and proper."

(The following Verification was filed December 20, 1973 (caption and signatures omitted))

"Verification

James W. Herron being first duly sworn does depose and state that the facts as stated in the foregoing pleading are true to the best of his information and belief.

/s/ JAMES W. HERRON

"Subscribed and sworn to before me this 13th day of December, 1973.

/s/ Dolores V. Exler
Notary Public

(Notary Seal)

My Commission expires: April 10, 1976."

(Whereupon, Proof of Service was filed and is in words and figures as follows: (Caption and signatures omitted)):

"Proof of Service"

"A copy of the foregoing document was hand delivered this 13th day of December, 1973 to the office of the Attorneys for Defendant."

/s/ JAMES W. HERRON

(Whereupon, Exhibit A, was filed with the foregoing document and is in words and figures as follows: (Caption and Signatures omitted)):
"Ex. A.

"Memorandum in Support of Plaintiff's Hearing On Default and Inquiry, June 28, 1973

"In accordance with the Court's direction at the conclusion of plaintiff's evidence in the above matter, we are pleased to submit a memorandum relative to jurisdiction, venue and a summary of the facts.

"1. There could be no question of venue as shown by plaintiff's Exhibit 1, same being abstract of the corporate record of the Secretary of State of Missouri showing that the defendant Delaware corporation was qualified to do business in the State of Missouri on January 22, 1968 having as its registered agent C. T. Corporation System, 314 North Broadway, St. Louis, Missouri and that service was duly obtained thereon in this cause by Sheriff's return as reflected in the Court file on March 16, 1973 after having been filed in the Circuit Clerk's Office of the City of St. Louis, Missouri on March 14, 1973.

"2. During the testimony of Mr. Ross G. Lavin, one of plaintiff's lawyers, evidence was shown to the Court by Plaintiff's Exhibit 2, a copy of Mr. Lavin's letter to a Mr. Robert Bucci, making him aware of the delinquency of defendant in failing to file a responsive pleading to plaintiff's petition.

"3. Confirmation of Mr. Bucci's knowledge of failure to file responsive pleadings was acknowledged by his letter of April 13, 1973 requesting time to employ local counsel to defend this action—See plaintiff's Exhibit 3.

"4. Mr. Lavin further testified to several telephone conversations with the said Mr. Bucci advising Mr. Bucci of defendant's delinquency in failing to file responsive pleading.

"5. Mr. Lavin's certified letter of June 5, 1973 (plaintiff's Exhibit 4) addressed to defendant, attention of Mr. Robert Bucci, advised that unless defendant's appearance was duly entered and/or pleading filed that plaintiff would have no alternative but to put this matter on the default docket. This exhibit was accompanied by plaintiff's Exhibit No. 5, same being return receipt showing acceptance of this letter by defendant on June 7, 1973.

"6. There can be no question here that all precautions were taken by plaintiff to adequately advise and admonish the hereinnamed defendant that plaintiff would be compelled to put this cause on the default docket and no advice was received from the defendant up to the time of hearing on June 28, 1973 of their concern in filing proper pleading to plaintiff's petition. Thus it is clearly shown to the Court that all requirements of action under 290.140 RSMo. have been fully complied with by plaintiff.

"7. Plaintiff, Lester L. Fulton, in the course of his testimony introduced Exhibit No. 7, being letter dated March 13, 1973 from the Director of Marketing of CESD, Division of defendant

ITT, prohibiting distributors such as the one at which plaintiff was employed at the time from hiring former employees of ITT.

"8. Exhibit 8 also produced during the course of plaintiff's testimony and consisting of a request for a service letter as of January 8, 1973, together with Exhibit 9, return receipt showing defendant's acceptance of this request for service letter on January 10, 1973, are all in compliance with the aforesaid statute.

(There is no 9* Supplied by Reporter).

"10. Exhibit No. 10 was properly introduced into evidence during plaintiff's testimony to show the defendant's worth or financial condition, same to be used as a consideration in determining the amount of punitive damages to be awarded. To refresh the Court's memory, the defendant's net worth, as shown by its own last published annual report in 1972, was in the amount of $3,620,061,000.00. Plaintiff's evidence also produced evidence to support his prayer in the amount of $21,-000.00 actual damages.

"As the Court is well aware, the defendant's financial condition is the proper subject for consideration for the purpose of assessing puntive damages. There can be no question that the plaintiff here is entitled to a very substantial award on this Court because of the aggravated circumstances in abundance as shown by plaintiff's evidence. Defendant here has unquestionably embarked on a program of harassment after discharge by the defendant in its failure to provide the service letter as required by statute; its warning by one of its supervisory employees, one Walter J. Pepple, that plaintiff would either sign resignation or 'he would no longer work in this industry.' The Court should further consider in this regard defendant's announcement of March 13, 1973 to its distributors that no ex-employees of defendant should be employed by the said distributors which, of course, was a pistol point arrangement that

penalities would immediately follow if such an edict was carried out by its distribtuors and eventually lead to the severance of plaintiff from his then present employment with Telephone Service Company of America in Birmingham, Alabama.

"The Court should further consider that in plaintiff's attempt to obtain employment following his discharge that he was requested to provide a letter from his immediate past employer which he was unable to do and that this condition exists in his present employment with Stanley Communications, Inc., Little Rock, Arkansas which company is still awaiting such a letter to be provided by plaintiff.

"It is also respectfully submitted to this Court that the plaintiff did sever his relations with Pacific Telephone Company where he had been employed for 14 years and 8 months consecutively before resigning from that job to accept employment with defendant. Severance of that employment also meant forfeiture of certain benefits which would have been flowing to him if his tenure with that company had not ceased, but as a result of his employment and being lured to ITT he has now forfeited beyond recall vested rights consisting of retirement payments to be attained on his 62nd birthday; insurance benefits of life and health, not only for himself but his wife and family; and the normal increase in his salary from Pacific Telephone Company.

Relative to punitive damages, under Missouri law, such damages are allowed in proportion to the degree of malice characterizing the act to the age, sex, health and character of the injured party, the intelligence, standing and *affluence of the tort feasor* and other like circumstances. *Johnson v. American Mutual Insurance Co.*, 335 F. Supp. 390.

The Missouri courts have frequently ruled in those cases involving assessment of punitive damages that the defendant's worth or financial condition is a consideration in determining

the amount of punitive damages to be awarded. This in *Walker v. St. Joseph Belt Railway Co.*, 102 S.W. 2d 718, decided *February 1, 1937*, and being an action for actual and punitive damages for failure to comply with the service letter statute, an award of $5,000.00 to a discharged employee was ruled not excessive upon evidence that corporation had assets in excess of $400,000.00 and other valuable properties. The Court further stated that an ordinary award of punitive damages would have but little deterrent effect upon it. Plaintiff here has deliberately called the Court's attention to this award to illustrate the difference in money value between that year and the present time and to further illustrate the difference in defendant's financial position in that case as compared to the instant case.

"In the Walker case, cited above, the award represented approximately 1¼% of defendant's net worth. The Court's attention is forcefully drawn to present plaintiff's prayer herein for punitive damages in the amount of $100,000.00 which does not closely approximate the 1¼% as awarded in the Walker case which in reality and is an infinitesimal small amount, to wit, .000027 of defendant's net assets.

"In *Potter v. Milbank Manufacturing Co.*, 489 SW 2d 197, the Supreme Court decided on December 11, 1972 an award of $20,000.00 punitive damages on a service letter action was shown as not excessive where defendant's net worth was $2,396,481.00.

"There is no intention to belabor the Court with further citations of substantial awards. In cases originating in Missouri on Service Letter actions, the trend certainly in recent years had been to liberalize the awards on punitive damages and plaintiff here feels that his prayer of $100,000.00 is indeed in keeping with the norms set out in recent decisions consistent with such decisions and actually is well below the percentages referred to above.

"Due consideration should be given to the 26½ years of consecutive employment in the field of communications which has now been terminated and that he presently is employed in a field in no wise associated with his former endeavor. It is for these reasons that plaintiff respectfully requests the Court for an award as prayed for in both Count I and II of his said petition."

"Ex.B

A Division of International Telephone and
Telegraph Corporation
60 Washington Street
Hartford, Conn. 06105
Phone (203) 549-1800
Telex: 99-366

"June 29, 1973.

"Ross G. Lavin, Esquire
Aubuchon and Lavin
Suite 1314
705 Olive Street,
St. Louis, Missouri, 63101.

"Re: Lester L. Fulton v. ITT

"Dear Mr. Lavin:

"I called your office today but you were out of town. Apologies for the delay in this matter. I will be on vacation July 2 through July 6 but want to discuss settlement of this matter on July 9, when I return.

"If we cannot reach agreement, I have plans to retain Stolar, Heitzmann & Eder of St. Louis to represent ITT."

"Thank you for your courtesy and cooperation in this matter.

Yours very truly

ROBERT A. BUCCI, Attorney."

Exhibit C.

Law Offices
Aubuchon and Lavin
Suite 1314
705 Olive Street
St. Louis, Missouri 63101
Area Code 314 621-1575

July 2, 1973

Received July 6, 1973
R.A. Bucci

ITT Communications Equipment and Systems
60 Washington Street
Hartford Conn. 06106

Attn: Mr. Robert A. Bucci
Attorney

Re: Lester L. Fulton v. ITT

Dear Mr. Bucci:

"I am now handling the above-styled matter.

"This will acknowledge receipt of your letter of June 29, 1973. Please call me upon return to your desk.

"Very truly yours

MICHAEL J. AUBUCHON

Ex.D.

"Memorandum for Clerk

"Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced, the Court will rule as follows on September 28, 1973:

"Judgment and finding of Court in favor of Plaintiff on Count I in the sum of $21,000.00 and costs.

"Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.00 as punitive damages.

"Filed September 19, 1973.

MICHAEL J. SCOTT, Judge

"Ex. E.

"Post marked"
St. Louis Mo.
26 Sept.
1973.

Michael F. Scott
Judge of the Circuit Court
Twenty-Second Judicial Circuit
St. Louis, Missouri 63101

Mr. Robert A. Bucci
Attorney at Law
60 Washington Street
Hartford, Connecticut 06106

Ex. F.

"Memorandum for Clerk

September 28, 1973

Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default.

"Upon testimony and evidence previously heard, adduced and taken as submitted, judgment and finding in favor of Plaintiff on Count I in the sum of $21,000.00 and costs. Judgment and finding of Court in favor of Plaintiff on Court II in sum of $75,000.00 as punitive damages.

MICHAEL J. SCOTT, Judge

APPENDIX E

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.
Cause No. 36962-F.
Div. No. 1.

COURT MEMORANDUM OPINION

Plaintiff filed this action against defendant corporation for refusal to furnish a service letter and judgment was granted and entered on September 28, 1973, by default. On November 20, 1973, defendant filed its First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, and the instant controversy involves the said motion.

Service of process is not challenged and defendant not only had additional notice but also received rather extensive information from plaintiff concerning the pending litigation. The evidence herein indicates that poor office assignment, or improper channeling, by house counsel for defendant actually created the present problem. Diligence on the part of defendant is conspicuous by its absence. Zbryk v. B. F. Goodrich, 344 S.W. 2d 138.

Defendant's current position is directed to two separate grounds or propositions. One is based on the charge of fraud and perjury. There is absolutely no creditable evidence to dem-

onstrate or support such assertion of fraud. While the evidence here presented on behalf of defendant may be contradictory or conflicting with that produced at trial, such circumstance does not warrant a charge of perjury. This court is in no position to weigh the testimony produced at the respective hearing. Head v. Ken Bender, 452 S.W. 2d 596.

The other irregularity upon which defendant relies relates to evidence introduced at trial. Defendant contends that testimony on issues other than one for service letter was adduced at trial and considered by the Court. It is claimed that such evidence exceeds the range of plaintiff's petition and is broader in scope. It appears that such irregularities, if any there be, do not constitute the type or class contemplated by the authorities. Korn v. Ray, 434 S.W. 2d 798.

A ruling on plaintiff's objections is not required because of the conclusion reached by the court in this proceeding.

Defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review, overruled and denied.

So ordered.

WILLIAM E. BUDER
Judge

APPENDIX F

"Whereupon, and on March 1, 1974, the following Notice of Appeal to Supreme Court of Missouri was filed, and is in words and figures as follows (Caption and signatures omitted):

"NOTICE OF APPEAL TO SUPREME COURT OF MISSOURI

"Notice is given that defendant, International Telephone and Telegraph Corporation appeals from the appealable order entered in this action on the 20th day of February 1974.

Jurisdiction of the Supreme Court is based on fact that this appeal involves:

(x) Construction of the federal or state Constitution.

/Signed/ JAMES W. HERRON
Attorney for Defendant-
Appellant

Dated March 1, 1974."

APPENDIX G

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

March 18, 1974

Mr. James W. Herron
Lewis, Rice, Tucker, Allen & Chubb
611 Olive Street
St. Louis, Missouri 63101

In re: Fulton v. International Telephone and Telegraph,
No. 58598

Dear Mr. Herron:

This will advise that the Court this day made the following order in the above-entitled cause:

"Cause ordered transferred to Missouri Court of Appeals, St. Louis District, because of lack of jurisdiction in this Court."

The mandate and all files are being mailed this day to said Court of Appeals.

Yours very truly

THOMAS SIMON
Clerk

TFS/vhg

cc: Messrs. Aubuchon and Lavin, 705 Olive, Suite 1314, St. Louis, Mo. 63101

Mrs. Rosa Curson, Clerk, Missouri Court of Appeals, St. Louis District, Civil Courts Bldg., St. Louis 63101

Judge Robert G. Dowd, Civil Courts Bldg., St. Louis, Mo. 63101

APPENDIX H

In the Missouri Court of Appeals
St. Louis District
Division Two

April Session, 1975

Lester L. Fulton,
Plaintiff-Respondent,
v.
International Telephone & Telegraph Corporation,
Defendant-Appellant.

Nos. 36090 and 36091

Appeal From Circuit Court
City of St. Louis
Hon. Michael J. Scott and
Hon. William E. Buder, Judges
Opinion Filed August 5, 1975

These are consolidated appeals; that in Cause No. 36090 from the granting of a special order allowing the appellant (hereinafter the defendant) to file a notice of appeal out of time, Rule 81.07, from a default judgment entered in the Circuit Court of the City of St. Louis on September 28, 1973, and that in Cause No. 36091 from an order of the same court denying defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review. Respondent (hereinafter the plaintiff) filed in this court a Motion to Dismiss the Appeal in Cause No. 36090, on the grounds that the defendant does not satisfy the criteria for the granting of the special order. Plaintiff's Motion to Dismiss has been taken with the case. For reasons hereinafter set out, we sustain plaintiff's Motion to Dismiss defendant's appeal from the default judgment, entered on September 28, 1973, in the Cir-

cuit Court of the City of St. Louis and we further affirm the trial court's denial of defendant's Motion to Set Aside Judgment, Quash Execution and Petition for Review.

Plaintiff filed his petition seeking damages for violation of the Service Letter Statute, § 290.140 RSMo. 1939, on the 14th day of March, 1973. Count I of plaintiff's petition prayed for actual damages of $21,000.00; Count II, punitive damages of $100,000.00. Personal service was had on C. T. Corporation System, 314 North Broadway, St. Louis, Missouri, the registered agent of the defendant, by serving a copy of the petition and summons on E. G. Farrelley, Secretary of the C. T. Corporation System, on March 16, 1973. No appearance having been entered on behalf of the defendant, and no motions or answer having been filed, plaintiff on June 12, 1973, upon request, was granted a default and inquiry, and the cause was set for hearing on June 28, 1973. On June 28, 1973, defendant still being in default, inquiry was conducted and at the request of the trial court a memorandum was filed and the cause was taken under submission. On September 28, 1974, judgment was entered in behalf of plaintiff in the amount of $21,000.00 on Count I of his petition and $75,000.00 on Count II of his petition.

On November 14, 1974, an entry of appearance was made by a St. Louis law firm in the trial court and at said time a Motion to Set Aside Judgment, Quash Execution and Petition for Review was filed. The following day, November 15, 1973, counsel for the defendant filed a Motion to Stay Execution and plaintiff's counsel was noticed to appear in the trial court on November 20, 1973, to take up defendant's Motion to Stay Execution. On said date, November 20, 1973, defendant's Motion to Stay Execution was taken up and submitted. On December 5, 1973, verification of the Motion to Stay Execution was filed and an indemnity bond in the amount of $115,000.00 with surety was presented and approved. The trial court on said date entered an order staying execution of

the judgment, and called up defendant's Motion to Set Aside the Judgment and Petition for Review and heard arguments thereon. Defendant filed an affidavit for continuance and the Motion was reset for December 19th, 1973. On December 19, 1973, the Motion was continued to December 20, 1973, and the defendant filed its First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review. On February 6, 1974, plaintiff filed his Answer to defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review. On February 7, 1974, defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review was heard and submitted and each party granted time until February 14, 1974, to file briefs. On February 20, 1974, the trial court entered its order denying defendant's Motion to Set Aside Judgment, and to Quash Execution and Petition for Review. On March 1, 1974, defendant filed its Notice of Appeal to the Supreme Court "from the appealable order entered in this action on the 20th day of February, 1974" and ten days later followed with a Motion for a Special Order to File a Notice of Appeal Out of Time pursuant to Rule 81.07 from the "judgment entered September 28, 1973" also in the Supreme Court. On March 18, 1974, the Supreme Court, on its own motion, transferred both the direct appeal from the default judgment of September 28, 1973, and the appeal from the order denying the defendant's Motion to this court on the grounds that jurisdiction in both was vested in the Missouri Court of Appeals, St. Louis District. On March 21, 1974, upon receipt of the two files from the Supreme Court, this court, inadvisedly we conclude, sustained defendant's Motion for a Special Order to File a Notice of Appeal Out of Time pursuant to the provisions of Rule 81.07.

We have concluded that the order permitting the defendant to file its notice of appeal out of time was improvidently granted, should now be set aside and held for naught, and defendant's appeal from the default judgment of September

28, 1973, be dismissed. We have reached this conclusion because we believe that the granting of the Order for the filing of a Notice of Appeal out of time under the facts of this particular case is at odds with the principle that the trial court should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof. The trial court in this case was afforded this opportunity by defendant's motions, held a hearing thereon, and thereafter entered an appealable order denying the relief sought by the defendant and from which the defendant has also perfected an appeal in this court in Cause No. 36091. Both appeals raise essentially the same Points Relied On for reversal of the trial court's judgments, and it would be a squandering of judicial time and effort to review the same grounds in two separate appeals.

For these reasons we sustain plaintiff's motion to dismiss defendant's direct appeal from the default judgment of September 28, 1973, and set aside and hold for naught the order of this court granting said appeal out of time as having been improvidently granted.

Moving now the defendant's appeal from the order of the trial court of February 20, 1974, denying defendant's motion to set aside the default judgment and petition for review—Cause No. 36091. It is necessary to set out in some detail the almost incomprehensible procrastination practiced by house counsel for the defendant once he received a copy of the summons and petition served on defendant's registered agent some time between March 20, 1973 and March 26, 1973, and the date of the entry of the default judgment on September 28, 1973.

Despite the fact he was notified by plaintiff's counsel by letter of June 5, 1973, that unless an entry of appearance or pleading were filed within one week on June 5, 1973, plaintiff would have no recourse but to take a default, no communication was

forthcoming from defendant's house counsel until June 29, 1973—the day after the inquiry hearing—when he advised plaintiff's counsel that he had called his office that day and was told that he was out of town and that he, defendant's house counsel, would be on vacation between July 2, and 6, but that he wanted to discuss the matter upon his return to his office on July 9, and if they could not reach an agreement he had "plans to retain" local counsel. An associate of plaintiff's counsel responded to this letter on July 2, 1973, and advised defendant's house counsel that he was now handling the cause, acknowledged receipt of the letter of June 29th and asked that defendant's house counsel call him when he had returned to his office.

On September 26, 1973, the trial judge mailed to the defendant's house counsel—who had not entered his appearance nor hired local counsel to do so by that time—a copy of a proposed memorandum for the clerk of the court which reads as follows:

> "Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced the Court **will rule as follows on September 28, 1973:**
>
> Judgment and finding of Court in favor of Plaintiff on Count I in the sum of $21,000.00 and costs.
>
> Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.000 as punitive damages." (Emphasis supplied.)

On September 28, 1973, the default judgment was entered in accordance with memorandum aforesaid. The copy of the proposed memorandum was received by defendant's house counsel on October 1, 1973, the Monday following the judgment entry of September 28, 1973, a Friday.

Following receipt of the court memorandum on October 1, 1973, defendant's house counsel took no action so far as plain-

tiff's counsel was aware until November 9, 1973, when he was advised by a telegram initiated to him by plaintiff's counsel that execution had been ordered on the judgment. This elicited a long distance telephone call from defendant's house counsel to plaintiff's counsel during which defendant's house counsel admitted his dereliction and pled for some time to see what he could do to alleviate the situation in which he found himself. Plaintiff's counsel agreed not to levy execution that date but requested defendant's house counsel to "get back to him" later that same day. House counsel did not "get back to" plaintiff's counsel and the next activity in the case was the entry of appearance of present counsel for the defendant on November 14, 1974, and the filing of defendant's Motion to Set Aside Judgment and to Quash Execution and Petition for Review.

A motion to set aside a default judgment is in the nature of an independent proceeding and a direct attack on the judgment. The name given the proceeding is unimportant, but in order to prevail on a motion to set aside a default judgment, the moving party must allege and prove that there was good reason for the default. Counsel's negligence in permitting the entry of a judgment by default is, in the absence of fraud or collusion, imputable to the client and the client is not entitled to relief. Askew v. Brown, 450 SW2d 446, 450 [2-5], (Mo. App. 1970). The motion is one which appeals to the sound discretion of the trial court and the Court of Appeals will not interfere with the trial court's action unless the record clearly demonstrates that there was an abuse of discretion and judgment on the motion was clearly erroneous. Ward v. Cook United, Inc., 521 SW2d 461, 470[10] (Mo.App. 1975).

While defendant does not allege fraud or collusion in the procurement of the judgment, reference is made to what it contends was a concealment of facts from the trial court which would have precluded the entry of judgment had the trial court known of their existence. These alleged facts may be divided into two categories: (1) that his testimony at the hearing for

the assessment of damages was untruthful and perjurious and (2) that he thereby concealed from the trial court that defendant actually was the source of his subsequent employment so that there was an absence of actual malice, spite, ill will, wantonness and maliciousness which was necessary to support an award of punitive damages. This contention is based upon testimony offered at the evidentiary hearing by the defendant. However, such evidence was merely in conflict with that of the plaintiff at the hearing to assess damages and is not the fraud referred to in the cases ruling on motions of this kind. False testimony or perjury ordinarily is not ground for vitiating a judgment. The fraud that vitiates a judgment is fraud which goes to its procurement, not fraud relating to the merits of the action. Head v. Ken Bender Buick Pontiac Inc., 452 SW2d 596, 598[6] (Mo.App. 1970).

We do not reach the question whether defendant presented sufficient evidence to establish that it had a meritorious defense to plaintiff's claim; the mere existence of a defense to the original action alone is ordinarily not a ground for vacating the judgment. Rubbelke v. Aebli, 340 SW2d 747, 751[3] (Mo. 1960).

We have concluded that the trial court did not abuse its discretion in denying defendant's Motion to Set Aside, Quash Execution and Petition for Review and therefore affirm.

The judgment of the trial court is affirmed.

JOHN J. KELLY, JR.,
Judge

James D. Clemens
(Presiding Judge)
Concurs

Joseph G. Stewart
(Judge)
Concurs

APPENDIX I

In the
Missouri Court of Appeals
St. Louis District

Lester L. Fulton, Respondent-Plaintiff, vs. International Telephone and Telegraph Corporation, Appellant-Defendant.	Consolidated Appeals No. 36,090 and No. 36,091.

MOTION TO REINSTATE APPEAL NO. 36090, FOR REHEARING OF CONSOLIDATED APPEALS NOS. 36090 AND 36091, OR IN THE ALTERNATIVE FOR TRANSFER TO THE ST. LOUIS DISTRICT OF THE MISSOURI COURT OF APPEALS EN BANC, OR IN THE ALTERNATIVE FOR TRANSFER TO THE MISSOURI SUPREME COURT.

Comes now defendant-appellant, and for its Motion to reinstate Appeal No. 36090, for a rehearing on consolidated Appeals Nos. 36090 and 36091, or in the alternative for transfer of said consolidated appeals to the St. Louis District of the Missouri Court of Appeals, en banc, or in the alternative for transfer to the Missouri Supreme Court, states as follows:

I. **This Court, in Dismissing Appeal No. 36090, Overlooked and Misinterpreted Material Matters of Law and Fact as Shown by Its Opinion in That:**

A. In premising its dismissal of the appeal in Appeal No. 36090 on the asserted "principle that the trial court

should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof," the opinion is contrary to Rule 73.01, Missouri Rules of Civil Procedure, and *Timmerman v. Ankrom*, 487 S.W.2d 567 (Mo.Sup., 1972), and this Court has either overlooked or misinterpreted said Rule and decision.

B. In premising its dismissal of Appeal No. 36090 on the grounds that the trial court was afforded this opportunity to correct its alleged errors by the filing of the defendant's Motion and First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review, this Court has overlooked or misinterpreted the law and facts because the trial court was proscribed from making a broad review into the sufficiency of the evidence to support the damage awarded by the decisions in *Edson v. Fahy*, 330 S.W.2d 854, 859(8) (Mo.Sup., 1960), and *Head v. Ken Bender Buick Pontiac, Inc.*, 452 S.W.2d 596 (St.L. App., 1970), and Judge Buder applied the rule of law in those decisions and refused to consider sufficiency of the evidence to support the judgment. This Court's opinion is therefore contrary to the *Edson* and *Head* decisions, *supra*.

C. In premising its dismissal on the statement that both appeals (Nos. 36090 and 36091) raise esssentially the same points relied on for reversal of the trial court's judgment and that it would be a squandering of judicial time and effort to review the same grounds in two separate appeals, the Court has overlooked the first and fourth points relied on in Appeal No. 36090 which were not raised in Appeal No. 36091. Further, none of the points raised in common by the two appeals were considered in arriving at a decision on the merits of Appeal No. 36091.

D. This Court had no power, authority or discretion to dismiss Appeal No. 36090 on the grounds asserted for said

dismissal in the opinion rendered in this consolidated appeal. The Court's opinion is contrary to, and either overlooked or materially misinterpreted, the previously decided cases of *State ex rel. Bayha v. Kansas City Court of Appeals*, 97 Mo. 331, 10 S.W. 855 (Mo.Sup., 1889), and *State ex rel. Mayfield v. City of Joplin*, 485 S.W.2d 473 (Sp.App., 1972).

E. The dismissal of Appeal No. 36090 deprived the appellant-defendant of due process of law in violation of Article I, Section 10 of the Constitution of Missouri, and Amendment 14 of the United States Constitution, and Article V, Section 5 of the Constitution of Missouri.

II. **This Court, in Affirming the Lower Court's Decision in Appeal No. 36091 Overlooked or Misinterpreted Material Matters of Law and Fact as Follows:**

A. This Court's conclusion that the appellant-defendant must allege and prove good reason for the default in order to prevail on its Motions filed in this case, materially misinterprets the law and is contrary to the previous decisions in the cases of *Berry v. Chitwood*, 362 S.W.2d 515, 517(3) (Mo.Sup., 1962); *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967); *McCoy v. Briegel*, 305 S.W.2d 29, 34(2) (St.L.App., 1957); and *Dewey v. Union Electric Light & Power Co.*, 83 S.W.2d 203 (St.L.App., 1935).

B. This Court materially misinterpreted the law in implicitly concluding that the irregularities asserted in defendant's Motions and Briefs were not a ground for relief in the absence of showing that there was good cause for the default, which is contrary to the decisions of the Missouri Supreme Court and Court of Appeals in *Berry v. Chitwood*, 362 S.W.2d 515, 517(3) (Mo.Sup., 1962); *State*

ex rel. Rhine v. Montgomery, 422 S.W.2d 661, 663(3) (Sp.App., 1967); *McCoy v. Briegel*, 305 S.W.2d 29, 34(2) (St.L.App., 1957); and *Dewey v. Union Electric Light & Power Co.*, 83 S.W.2d 203 (St.L.App., 1935).

C. This Court on Appeal No. 36091 overlooked the material matters of fact and law raised by Points I, II and III of the appellant-defendant's Brief in Appeal No. 36091 as the opinion indicates that none of the matters raised in those points was considered.

D. The Court overlooked or misinterpreted a material matter of fact in failing to observe that the thrust of the appellant's Motion and Argument on Appeal No. 36091 was that the judgment entered was coram non judice and void and failing to consider and determine the merit of this point.

III. **This Consolidated Appeal Should Be Transferred to the Missouri Supreme Court Because as Pointed Out in Section I, Paragraphs A, B, D and E, and Section II, Paragraphs A and B of This Motion and Suggestions in Support Thereof, the Opinion Is Contrary to Previous Decisions of the Missouri Supreme Court or Other Appellate Courts.**

IV. **This Consolidated Appeal Should Be Transferred to the Missouri Supreme Court Because It Involves the Following Questions of Law of General Interest and Importance:**

A. The question of whether or not this Court can dismiss an appeal on the grounds stated in the opinion after issuing a special order under Supreme Court Rule 81.07 and Section 512.060, Missouri Revised Statutes, 1969, allowing filing of a Notice of Appeal out of time and after appellant has duly perfected that appeal and complied with Court rules in pursuing said appeal.

B. The question of whether or not the trial court must be given an opportunity to correct its errors before appeal of a non-jury case.

C. The question of whether or not a showing of good cause for the default is a necessary condition precedent to setting aside a default judgment challenged on grounds that it is coram non judice and void.

D. The question of whether or not the irregularities present on the record of this cause are legally grounds for setting aside the judgment.

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231-5833
Attorneys for Appellant-Defendant

Acknowledgment of Service

The undersigned, attorney for plaintiff-respondent, certifies that on this 19th day of August, 1975, a copy of the above and foregoing was personally delivered to his office.

ROBERT H. LAVIN

APPENDIX J

Office of the Clerk
Area Code 314
493-4344

Gerald M. Smith, Chief Judge
Robert G. Dowd, Judge
Joseph J. Simeone, Judge
Harry L. C. Weier, Judge
James D. Clemens, Judge
John J. Kelly, Jr., Judge
Theodore McMillian, Judge
George F. Gunn, Jr., Judge
Joseph G. Stewart, Judge
Albert L. Rendlen, Judge

Missouri Court of Appeals
St. Louis District
Civil Courts Building St. Louis, Mo. 63101

September 8, 1975

Messrs. Lavin & Drese
Attorneys at Law
705 Olive St., Suite 1025
St. Louis, Mo. 63101

Messrs. Lewis, Rice,
Tucker, Allen & Chubb
Mr. James W. Herron
Attorneys at Law
611 Olive St., Suite 1400
St. Louis, Mo. 63101

Nos. 36090 & 36091—Lester L. Fulton, Respondent, v. International Telephone and Telegraph Corporation, Appellant.

Gentlemen:

The Court has today made the following order in the above entitled cause:

Appellant's motion for rehearing or transfer to Court En Banc or transfer to Supreme Court denied.

Yours truly

ROSALIE THIES
Deputy Clerk

gb

9-9-75

APPENDIX K

In the Supreme Court
of the
State of Missouri

Lester L. Fulton, Respondent-Plaintiff, vs. International Telephone and Telegraph Corporation, Appellant-Defendant.	Consolidated Appeals Nos. 36090 and 36091, in the Missouri Court of Appeals, St. Louis District No. 59258.

APPLICATION FOR TRANSFER OF CONSOLIDATED APPEALS 36090 AND 36091

Comes now appellant-defendant and applies to this Court for an Order transferring consolidated appeals 36090 and 36091 from the Missouri Court of Appeals, St. Louis District, to this Court. As grounds for this Application, appellant-defendant states as follows:

I

The Opinion of the Missouri Court of Appeals, St. Louis District, in This Consolidated Appeal Is Contrary to Previous Decisions of Appellate Courts of This State.

A. The Court of Appeals, in dismissing appeal 36090 and refusing to consider the merits of that appeal, acted contrary to decisions of appellate courts of this state in one or more of the following respects:

1. In premising its dismissal of the appeal in Appeal 36090 on the asserted "principle that the trial court should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof," the opinion is contrary to *Timmerman v. Ankrom*, 487 S.W.2d 567 (Mo.Sup., 1972) and Rule 73.01, Missouri Rules of Civil Procedure which provide that no motion for new trial is required for review of a court tried non-jury case.

2. In premising its dismissal of Appeal No. 36090 on the grounds that the trial court was afforded this opportunity to correct its alleged errors by the filing of the defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review after more than thirty days had passed since entry of the judgment, the court's decision was contrary to *Edson v. Fahy*, 330 S.W.2d 854, 859(8) (Mo.Sup., 1960), which proscribed the trial court from making a broad review into the sufficiency of the evidence to support the damage award.

3. In dismissing Appeal No. 36090, the Court acted contrary to the decision of *State ex rel. Bayha v. Kansas City Court of Appeals*, 97 Mo. 331, 10 S.W. 855 (Mo.Sup., 1889), and *State ex rel. Mayfield v. City of Joplin*, 485 S.W.2d 473 (Sp.App., 1972) which hold that the court should decide the appeal on its merits and has no power to dismiss the appeal on the grounds asserted.

B. In affirming, in Appeal No. 36091, the trial court's decision overruling defendant's First Amended Motion to Set Aside Judgment, etc., the appellate court's opinion was contrary to decisions of appellate courts of this state in one or more of the following respects:

1. The Court's conclusion that the appellant-defendant must allege and prove good reason for the default in order

to prevail on its motions filed in this case, is contrary to the previous decisions in the cases of *Berry v. Chitwood*, 362 S.W.2d 515, 517(3) (Mo. Sup., 1962) and *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967) because the defendant's attack on the judgment was based on the assertion that the judgment was void and the cases cited hold that attacks on a void judgment are not limited to grounds assertable under Rule 74.32, Missouri Rules of Civil Procedure.

2. The Court implicitly concluded that the irregularities asserted in defendant's Motion and Briefs were not a ground for relief in the absence of showing that there was good cause for the default, which is contrary to the decisions of the Missouri Supreme Court and Springfield Court of Appeals in *Berry v. Chitwood*, 362 S.W.2d 517 (3) (Mo.Sup., 1962) and *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967) which establish that a void judgment gains no legitimacy from the action or inaction of the defaulting party.

II

This Consolidated Appeal Should Be Transferred to the Missouri Supreme Court Because It Involves the Following Questions of Law of General Interest and Importance:

A. The question of whether or not an appellate court can dismiss an appeal on the grounds stated in the opinion, that being:

> "[T]hat the trial court should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof,"

after allowing filing of a Notice of Appeal out of time and after appellant has duly perfected that appeal and complied with court rules in pursuing said appeal.

B. The question of whether or not the trial court must be given an opportunity to correct its errors before appeal of a default judgment, entered by a judge sitting without a jury.

C. The question of whether or not a showing of good cause for the default is a necessary condition precedent to setting aside a default judgment challenged on grounds that it is coram non judice and void.

D. The question of whether or not the irregularities present on the record of this cause, those being that the judgment was entered on a cause of action not pleaded and therefore was *coram non judice*, that a de facto amendment of the pleading occurred without service of an amended pleading on defendant, and that defendant was denied due process of law, are legally grounds for setting aside the judgment.

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Attorneys for Appellant-Defendant

APPENDIX L

Supreme Court No. 59258
Court of Appeals Nos. 36090 and 36091
In the Supreme Court of Missouri

September Session 1975

Lester L. Fulton, Respondent,

vs. Transfer

International Telephone & Telegraph Corporation, Appellant.

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the St. Louis District of the Missouri Court of Appeals, it is ordered that said application be, and the same is hereby denied.
State of Missouri—SCt.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1975, and on the 10th day of November 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 10th day of November, 1975.

THOMAS F. SIMON, Clerk
By VIRGINIA H. GOTTLIEB, D. C.

APPENDIX M

POINTS RELIED ON

I

The Court Erred in Not Vacating and Setting Aside the Judgment Entered September 28, 1973, Because It Was Entered on Causes of Action Not Within the Purview of the Pleadings and Therefore Was Coram Non Judice and Void.

A Court's jurisdiction in granting a default judgment extends only to the boundaries of the plaintiff's pleading. A judgment based on issues not raised by the pleadings is, therefore, *coram non judice* and void.

Burns v. Ames Realty Co., 31 S.W.2d 274, 276 (St.L. App., 1930);

Kemp v. Woods, 251 S.W.2d 684, 688 (Mo. Sup., 1952);

Reynolds v. Stockton, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464 (1891);

Restatement of Judgments, Ch. 2, § 8, Pages 48-9;

49 C.J.S., Judgments § 60;

47 Am. Jur. 2d, Judgments § 1177;

Rule 74.11, Missouri Rules of Civil Procedure.

There was no basis for entry of the judgment on the cause of action pleaded. A review of the evidence introduced at the June 28 hearing clearly shows there was no basis for the damages assessed. The fatal deficiencies in evidence revealed by a review of the transcript of the June 28 evidentiary hearing are:

(1) There is no evidence to show prospective employment lost by reason of failure to have a service letter,

the salary to be paid in any such position and the date when employment would commence, and

(2) There is no evidence that plaintiff lost a prospective employment in the St. Louis area by reason of failure to have a service letter.

There was therefore, no basis in law for entry of the judgment of actual and punitive damages on the pleaded cause of action.

Johnson v. American Mutual Liability Insurance Co., 335 F. Supp. 390 (W.D. Mo., 1971);

Booth v. Quality Dairy Co., 393 S.W.2d 845 848(2) (St.L. App., 1965);

Heuer v. John R. Thompson Co., 251 S.W.2d 980, 985 (4) (St.L. App., 1952);

Bubke v. Allied Building Credits, Inc., 380 S.W.2d 516 (St.L. App., 1964);

Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719 (Mo. Sup., 1966).

The record discloses that the judgment was based on issues and causes of action not within the purview of the issues made by his pleadings, including breach of contract of employment by wrongful discharge, blacklisting, interference with contractual relations, conspiracy and fraudulently inducing plaintiff to enter employment with defendant. Wrongful discharge is not part of a claim for breach of the Service Letter Statute.

Woods v. Kansas City Club, 386 S.W.2d 62 (Mo. Sup., 1964);

Roberts v. Emerson Electric Mfg. Co., 338 S.W.2d 62 (Mo. Sup., 1960).

The judgment being void is subject to being attacked at any time and the avenues of attack are not limited as in attacks on judgments which are voidable.

State ex rel. Rhine v. Montgomery, 422 S.W.2d 661 (Sp. App., 1967);

Wooden v. Friedenburg, 198 S.W.2d 1 (Mo. Sup., 1946);

Dewey v. Union Electric Light & Power Co., 83 S.W.2d 203 (St.L. App., 1935);

McCoy v. Briegel, 305 S.W.2d 29, 34(2) (St.L. App., 1957).

The Trial Court mistakenly concluded that a void judgment could only be attacked for an irregularity within the meaning of Rule 74.32, Missouri Rules of Civil Procedure.

Berry v. Chitwood, 362 S.W 2d 515, 517(3) (Mo. Sup., 1962).

II

The Record Discloses That the Judgment Was Entered in Violation of Fundamental Due Process Requirements of the Missouri and United States Constitutions.

Article I, Section 9 of the Constitution of Missouri;

Amendment XIV to the United States Constitution.

Due process of law requires, as a bare minimum, notice and an opportunity to be heard.

Flickinger v. Flickinger, 494 S.W.2d 388, 394(14) (K.C. App., 1973).

III

The Trial Court Erred in Concluding That the Record in This Cause, During the Period Prior to Entry of the Judgment, Showed No Irregularities Which Required the Judgment Be Set Aside (T. 193).

An irregularity within the purview of Rule 74.32, Missouri Rules of Civil Procedure, is a want of adherence to some pre-

scribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an unreasonable time or improper manner.

Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 106 (Mo. Sup., 1937).

The record, including the transcript of the evidentiary hearing and the memorandum filed by plaintiff prior to judgment, shows, without recourse to extrinsic evidence, the presence of irregularities within the definition in the *Crabtree* case.

Dewey v. Union Electric Light & Power Co., 83 S.W.2d 203 (St.L. App., 1935);

Rook v. Oliver Trucking Company, 505 S.W.2d 157 (St. L. App., 1973);

Lawton-Byrne-Bruner Ins. A. Co. v. Air-Flight Cab Co., 479 S.W.2d 218 (St.L. App., 1972);

Flickinger v. Flickinger, 494 S.W.2d 388 (K.C. App., 1973).

The irregularities disclosed include:

(a) The judgment was entered on causes of action not pleaded (see Section I, above) and therefore is *coram non judice* and void.

Hecker v. Bleich, 3 S.W.2d 1008 (Mo. Sup., 1927);

Rule 74.11, Missouri Rules of Civil Procedure.

(b) A de facto amendment of the pleading occurred without service of an amended pleading on Defendant.

Diekman v. Associates Discount Corporation, 410 S.W. 2d 695 (St.L. App., 1966);

Rule 43.01(a), Missouri Rules of Civil Procedure;

Rule 74.11, Missouri Rules of Civil Procedure.

(c) The record discloses a denial of fundamental due process.

Crabtree v. Aetna Life Ins. Co., supra.

IV

Defendant-Appellant Had a Meritorious Defense to the Plaintiff's Claim Because the Record Discloses That the Plaintiff's Petition Was Untrue in Various Material Matters and Plaintiff Had No Claim for Relief as a Matter of Law.

Plaintiff's own evidence at the June 28 hearing disproved his allegations that the absence of a service letter precluded him from securing similar employment to that he had with the defendant and that he sustained $21,000 damages as a result of failing to have a service letter.

Plaintiff concealed from and failed to advise the Court that the defendant had recommended him for and obtained his subsequent employment with a distributor, which was a defense to the allegations in Count II that the absence of a service letter was due to actual malice, spite, ill will, and was wilfull, wanton and malicious.

Evidence introduced by the plaintiff at the June 28 evidentiary hearing established that he had no claim for relief under the Service Letter Statute.

Horstman v. General Electric Company, 438 S.W.2d 18 (K.C. App., 1969).